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In the Supreme Court of the United States

OCTOBER TERM, 1984

VICTOR DANTE AND EDWARD LEVINE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals improperly applied the "clearly erroneous rule" in reviewing a district court finding that the prosecutor did not intend to provoke a mistrial when he mentioned the subject of organized crime in his opening statement.

1. Petitioners were indicted in the United States District Court for the Northern District of Georgia on charges of collecting an extension of credit through extortionate means and conspiring to do so, in violation of 18 U.S.C. 894. Petitioner Dante was also charged with three counts of filing a false income tax return, in violation of 26 U.S.C. 7206.

Prior to trial, petitioner Dante's counsel expressed concern about certain discovery materials that referred to Dante and some of his associates as members of organized

crime. Arguing that the subject of organized crime would be inflammatory, counsel moved that the prosecutor not refer to organized crime in his opening statement. In response, the court directed the prosecutor not to mention organized crime in the presence of the jury without first bringing the matter to the court's attention (Pet. App. 1).

In the course of his opening statement, the prosecutor did not argue that either petitioner was a member of organized crime, but he did mention the subject of organized crime by referring to two of the government witnesses as having organized crime connections (Pet. App. 2). Although defense counsel did not object to the comments at the time they were made, counsel subsequently moved for a mistrial on the ground that the prosecutor's comments violated the district court's order to avoid the subject of organized crime (*ibid.*). Over the prosecutor's opposition, the district court granted a mistrial.

Petitioners then moved to dismiss the indictment, arguing that the prosecutor had intentionally provoked them into making the mistrial motion so as to force the termination of the trial. After a hearing, the district court found that although the prosecutor's conduct was improper, the prosecutor had not intended to provoke a mistrial (Pet. App. 2). Under this Court's decision in *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), the district court therefore held that the Double Jeopardy Clause does not bar a retrial.

The court of appeals affirmed in a brief opinion. Initially, the court noted that the district court's findings regarding the prosecutor's intent could be overturned only if those findings were clearly erroneous (Pet. App. 2-3). Upon reviewing the district court's findings, the court of appeals held that they were "amply supported by the record" (*id.* at 4). In particular, the court of appeals noted that the remarks

about organized crime had referred only to the government's witnesses, and not to petitioners. In addition, the court observed, the district court had found that the delay in the proceedings caused by the mistrial would work to the advantage of petitioners, not the government (*id.* at 3). These factors, the district court had found, supported the prosecutor's representation that he had not made the comments about organized crime with the intent to provoke a mistrial (*ibid.*).

2. In *Orgeon* v. *Kennedy, supra,* this Court set forth the standards governing the application of double jeopardy principles when mistrials are declared on a defendant's motion. When the defense moves for a mistrial, the Court held, a retrial is not barred by the Double Jeopardy Clause unless the prosecutor intended, by the conduct that caused the mistrial, to provoke the defendant into moving for the mistrial. 456 U.S. at 676, 679. The determination whether the prosecutor intended to provoke the mistrial, the Court noted, "merely calls for the court to make a finding of fact." *Id.* at 675.

Because the issue of the prosecutor's intent is a purely factual matter, the court of appeals was manifestly correct in applying the clearly erroneous rule to the district court's findings on that issue. Indeed, every court of appeals that has addressed the issue has held, as the court of appeals held in this case, that the district court's finding on the issue of intent should be reviewed under the clearly erroneous test. See *United States* v. *Wodtke,* 711 F.2d 86, 88 (8th Cir. 1983); *Wassal* v. *Ryan,* 705 F.2d 970, 971 (8th Cir. 1983); *Robinson* v. *Wade,* 686 F.2d 298, 309 (5th Cir. 1982); *United States* v. *Curtis,* 683 F.2d 769, 776 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); *United States* v. *Singleterry,* 683 F.2d 122, 125 (5th Cir.), cert. denied, 459 U.S. 1021 (1982); *United States* v. *Green,* 636 F.2d 925, 928 (4th Cir.

1980), cert. denied, 451 U.S. 929 (1981); see also *United States* v. *McConney,* 728 F.2d 1195, 1203-1204 n.10 (9th Cir. 1984).

Moreover, as this Court's cases demonstrate, issues of intent are routinely treated as factual matters subject to the clearly erroneous rule. See *Pullman-Standard* v. *Swint,* 456 U.S. 273, 288 (1982) ("[t]reating issues of intent as factual matters for the trier of fact is commonplace"; clearly erroneous test applies); *Commissioner* v. *Duberstein,* 363 U.S. 278, 286 (1960) (intent of donor in tax case is a question of fact subject to the clearly erroneous rule); *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341 (1949) ("[f]indings as to the design, motive and intent with which men act" are peculiarly factual issues and therefore subject to appellate review under the clearly erroneous standard); see also *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534 (1979) (clearly erroneous rule applicable to findings of discriminatory intent in a school desegregation case).

In arguing that the issue of intent should not have been reviewed under the clearly erroneous test, petitioners rely on this Court's decision in *Neil* v. *Biggers,* 409 U.S. 188 (1972), and *Bose Corp.* v. *Consumers Union of United States, Inc.,* No. 82-1246 (Apr. 30, 1984). Neither case helps them.

In *Neil* v. *Biggers, supra,* the Court held that a victim's in-court identification of her assailant was sufficiently reliable to be allowed in evidence even though the earlier station-house show-up might have been suggestive. In finding the clearly erroneous test inappropriate for review of the ruling in that case, the Court noted that "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." 409 U.S. at 193 n. 3. The Court also pointed out (*ibid.*) that the relevant facts were contained mainly in the

state court record and the district court's evidentiary hearing was limited to two factual issues deemed irrelevant to this Court's disposition. Finally, it found that the district court's rulings were "clearly erroneous" (*id.* at 200). Whatever room there may be for disagreement regarding the Court's classification of the issue before it in *Neil* as essentially legal rather than factual, the case provides no support for use of a standard other than "clearly erroneous" for review of the quintessentially factual issue of intent on which the instant case turns.

Bose Corp. v. *Consumers Union, supra,* is likewise inapposite. Contrary to petitioners' suggestion (Pet. 8-9), the Court in that case did not hold that the clearly erroneous rule is inapplicable to all factual findings relating to constitutional claims. Rather, the Court simply reaffirmed the principle that, in the context of First Amendment claims, the courts must exercise "independent appellate review" of factual findings that determine whether the speech in question is constitutionally protected. The *Bose Corp.* decision reflects concerns unique to the First Amendment context and does not upset the well-established practice of applying the clearly erroneous rule to the review of factual findings in other contexts, including where constitutional issues are at stake.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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